

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JUN 15 2004

JAMES R. LARSEN, CLERK  
DEPUTY  
RICHLAND, WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IN RE RIVER PARK SQUARE  
PROJECT BOND LITIGATION.

NO. CS-01-0127-EFS

ORDER GRANTING IN PART AND  
DENYING IN PART THE CITY OF  
SPOKANE'S MOTION FOR ORDER  
CLARIFYING CONFIDENTIALITY OF  
SETTLEMENT COMMUNICATIONS,  
GRANTING IN PART AND DENYING  
IN PART RHUBARB SKY LLC'S  
MOTION TO INTERVENE ON ISSUE  
OF SCOPE OF COURT'S MEDIATION  
CONFIDENTIALITY ORDER, AND  
DEFINING THE SCOPE OF  
CONFIDENTIALITY ORDER

On May 27, 2004, the Court conducted a motion hearing in the above-captioned matter. J. David Blair-Loy appeared on behalf of Rhubarb Sky LLC ("Rhubarb Sky"), Laurel Siddoway appeared for the City of Spokane (the "City"), Ladd Leavens appeared for Citizens Realty Company, Lincoln Investment Company of Spokane, River Park Square, LLC, and RPS II, LLC (taken together, the "RPS Defendants"), and William Cronin appeared on behalf of Preston Gates & Ellis ("Preston Gates"). The parties were represented at the hearing as reflected in the Court's minutes, (Ct. Rec. 1886). At the hearing, the Court considered the City's Motion for Order Clarifying Confidentiality of Settlement Communications, (Ct. Rec. 1836), and Rhubarb Sky's Motion

1 to Intervene on Issue of Scope of Court's Mediation Confidentiality  
2 Order, (Ct. Rec. 1848). Both motions were appropriately accompanied  
3 by memoranda. After reviewing the file and hearing the arguments of  
4 counsel, the Court orally granted Rhubarb Sky's Motion to Intervene,  
5 (Ct. Rec. 1848), and sketched the limits of confidentiality as used in  
6 its Local Rules and in various orders entered in this case by Judge  
7 Suko. This Order memorializes and supplements the oral rulings of the  
8 Court.

### 9 I. ISSUES

10 In its motion, the City asks the Court to clarify Judge Suko's  
11 confidentiality order. The City was prompted to file the motion to  
12 ensure the actions it took with respect to a public record request  
13 were in compliance with Washington's Public Disclosure Act, R.C.W. §  
14 42.17.250 *et seq.*

15 The City's motion seeks clarification on the following issues:

16 (1) Whether the Court's referral order in conjunction with  
17 Local Rule 16.2 (c)(4), or Judge Suko's later  
18 Confidentiality Order and/or settlement conference orders  
19 protect the confidentiality of all settlement communications  
among counsel and party representatives participating in the  
mediation process, whether or not occurring during, or with  
a view to, a particular settlement conference, and

20 (2) Whether the Court's referral order in conjunction with  
21 Local Rule 16.2 (c)(4), or Judge Suko's later  
22 Confidentiality Order and/or settlement conference orders  
23 protect the confidentiality of all settlement communications  
among party representatives, even representatives who are  
not direct participants in the mediation process.

24 In response, Rhubarb Sky identifies several categories of  
25 documents that it believes are not within the boundaries of the orders  
26 entered as part of the federal court mediation process in this case,  
(hereafter, "Confidentiality Orders"). In the weeks before the

1 settlement agreement with the Plaintiffs was formalized, the City  
2 communicated with Bond counsel, the Financial Advisor, the  
3 Underwriter, and other non-legal consultants. Rhubarb Sky wants the  
4 "2004 bond documents" that the City refuses to produce. In addition,  
5 it requests, and the City declines to release, communications from the  
6 RPS Defendants to recently-elected City council member, Joe Shogan.  
7 Rhubarb Sky argues that because Mr. Shogan was not a member of the  
8 City's mediation team and was not a direct participant in the  
9 litigation, these communications do not fall within the  
10 Confidentiality Orders. Finally, Rhubarb Sky requests and the City  
11 declines to release a "one-page" record of a telephone message dated  
12 February 19, 2004, from Internal Revenue Service agent Derek Knight to  
13 City Chief Financial Officer Gavin Cooley on the grounds that it  
14 reflects mediation information. In summary there are three groups of  
15 documents at issue: (1) 2004 bond documents, (2) Shogan  
16 communications, and (3) IRS telephone message.

## 17 **II. HISTORY**

18 On June 19, 2002, the Court referred this case to mediation  
19 pursuant to Local Rule 16.2(c)(4) which provides, in pertinent part:

20 Proceedings Confidential. All proceedings of the mediation  
21 conference, including any statement made by a party,  
22 attorney, or other participant, shall, in all respects, be  
23 confidential and may be privileged and not reported,  
24 recorded, placed in evidence, made known to the trial court  
or jury, or construed for any purpose as an admission  
against interest.

25 During the course of mediation, Judge Suko issued a number of  
26 orders. In his October 4, 2002, Order, Judge Suko expanded the  
materials to be treated as confidential to include:

1 all memos, documents, reports, compilations, statements of  
2 position and related materials, whether in written, printed,  
3 electronic or other format, prepared, generated or received  
4 for purposes of mediation shall be and remain confidential  
and not be disclosed, reproduced or otherwise summarized to  
non-parties to this litigation.

5 On May 23, 2003, Judge Suko issued an Order that made clear the  
6 confidentiality requirements outlined above were ongoing: "Counsel for  
7 the parties and their clients are herewith required to keep  
8 confidential the substance of ongoing negotiations which occur in this  
9 proceeding prior to arrival at a tentative settlement." In his August  
10 22, 2003, Order, Judge Suko denied the City's motion seeking relief  
11 from the confidentiality order, holding that confidentiality is a  
12 critical part of any successful mediation process, but cautioned that  
13 "[t]hrowing a veil of secrecy over the entire controversy, including  
14 matters of public record, . . . was not what the confidentiality  
15 orders were intended to do."

16 In March 2004, the City received the records request from Rhubarb  
17 Sky that it believes would violate the Confidentiality Orders. This  
18 hearing followed.

### 19 **III. DISCUSSION**

20 It is undisputed that the Court has the authority to determine  
21 the scope of its Confidentiality Orders and it is for the state courts  
22 to enforce Washington's Public Disclosure Act.

23 In defining the breadth of the phrase, "for the purposes of  
24 mediation," this Court must be careful not to throw, "a veil of  
25 secrecy over the entire controversy, including matters of public  
26 record," as Judge Suko aptly put it. To begin, anything prepared by a  
party or counsel or experts retained by a party for a mediation

1 session and anything occurring during a mediation session are  
2 undisputedly, "for the purposes of mediation" and therefore, within  
3 the breadth of the Confidentiality Orders. Further, the term embraces  
4 settlement discussions between or among attendees following a  
5 mediation session that are an extension of matters prepared for and  
6 discussed at that mediation session. However, not every document  
7 produced or contacts made by a party following a mediation session,  
8 regardless of how long thereafter, are "for the purposes of  
9 mediation." This is particularly true when one of the parties is a  
10 public entity subject to state public disclosure laws as is the City.

11 Of the three groups of documents at issue, the Court  
12 unhesitatingly rules that communications between the City and other  
13 government agencies are not within the term "for the purposes of  
14 mediation" as used in the Confidentiality Orders. In particular, the  
15 February 19, 2004, telephone message from the Internal Revenue Service  
16 to the City does not fall within that phrase. As to the  
17 communications between Ms. Cowles and Mr. Shogan before he was sworn  
18 in, they are not "for the purposes of mediation" as used in the  
19 Confidentiality Orders. Councilman Shogan was not a member of the  
20 City Council nor a member of the mediation team when those  
21 communications occurred. However, communications between them after  
22 he took office do fall within both the letter and spirit of the phrase  
23 and, therefore, are subject to the Confidentiality Order. It is  
24 immaterial that the Councilman was not a member of the City's  
25 mediation team; as a member of the City Council, he was an integral  
26 part of settlement efforts. His views on settlement were undoubtedly

1 important to the other members of the City Council and to the team.

2 Third, the communications between the City and its various expert  
3 advisors on the subject of issuing general obligations bonds to  
4 replace the revenue bonds were not "for the purposes of mediation."  
5 These laudable efforts to construct a creative, if partial,  
6 resolution to the litigation can not be defined as "for the purposes  
7 of mediation" without erecting a barrier of secrecy to all efforts  
8 following an unsuccessful mediation. To rule otherwise would permit  
9 parties to engage in a mediation session and thereafter pursue  
10 different strategies for an extended period as confidential without  
11 reconvening any other mediation session. That is not "for the  
12 purposes of mediation." The Court does caution that no negative  
13 inference regarding any party or counsel in this case should be drawn  
14 from the expression of this concern.

15 The Court, as requested by the City, has clarified what is  
16 embraced by the phrase "for the purposes of mediation" as used in the  
17 federal Confidential Orders, recognizing that it is for the Washington  
18 state courts to apply Washington's Public Disclosure Act to such  
19 material that is not covered by the federal Confidentiality Orders in  
20 such state court cases as may follow.<sup>1</sup> Accordingly,

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23 <sup>1</sup>In response to Preston Gates' submission in which counsel  
24 describes a series of phone calls and e-mails exchanged between  
25 counsel and Judge Suko, the Court concludes clearly such  
26 correspondence, as described, would be covered by the Confidentiality  
Orders. However, the Court specifically observes that merely labeling

1 **IT IS HEREBY ORDERED:**

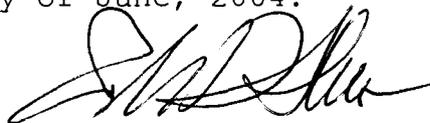
2 1. The City of Spokane's Motion for Order Clarifying  
3 Confidentiality of Settlement Communications, (Ct. Rec. 1836), is  
4 **GRANTED IN PART AND DENIED IN PART.**

5 2. Rhubarb Sky LLC's Motion to Intervene on Issue of Scope of  
6 Court's Mediation Confidentiality Order, (Ct. Rec. 1848), is **GRANTED**  
7 **IN PART AND DENIED IN PART.**

8 3. Specifically, the following materials are **NOT within the**  
9 **scope of the Confidentiality Orders: (1) the 2004 bond documents,**  
10 **(2) IRS telephone message, and (3) Shogan communications (prior to**  
11 **taking office only). It is for the Washington state courts to apply**  
12 **Washington's Public Disclosure Act to such material that is not**  
13 **covered by the federal Confidentiality Orders.**

14 **IT IS SO ORDERED.** The District Court Executive is directed to  
15 enter this Order and to furnish copies to counsel.

16 **DATED** this 15<sup>th</sup> day of June, 2004.

17 

18 \_\_\_\_\_  
19 EDWARD F. SHEA  
20 United States District Judge

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24 \_\_\_\_\_  
25 materials with captions such as "CONFIDENTIAL FOR SETTLEMENT &  
26 MEDIATION PURPOSES ONLY" is an insufficient means to shield documents  
otherwise subject to disclosure.